

## Breuer, Rich@Waterboards

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**From:** Denton, Debra <Denton.Debra@epa.gov>  
**Sent:** Tuesday, May 26, 2015 10:11 AM  
**To:** Breuer, Rich@Waterboards  
**Subject:** FW: Inside EPA on TST case

### Court Rejects Suit Over EPA Waster Testing Memos

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A federal district court in California has dismissed a suit by state wastewater utilities claiming EPA letters mandated burdensome new toxic testing procedures in Clean Water Act (CWA) discharge permits, finding the case is moot since EPA has withdrawn the memos -- quashing the possibility of a decision to expand judicial review of agency letters.

In a May 15 ruling, Chief Judge Morrison C. England Jr., of the U.S. District Court for the Eastern District of California, declines to decide whether EPA's memos to state officials seeking the use of certain toxicity tests in water permits are reviewable by the court, because EPA has voluntarily withdrawn them and a similar situation is unlikely to arise in the future.

"[T]here is no pattern of behavior that makes future litigation between Plaintiffs and Defendants likely. Finally, as stated above, the exact circumstances of this case are unlikely to occur again as any new [Alternative Test Procedure (ATP)] application and subsequent decision would be based on a new record and an amended regulation," England says in his order dismissing Southern California Alliance Of Publicly Owned Treatment Works (SCAP), et al. v. EPA.

SCAP and its allies had sought to challenge March 2014 correspondence between EPA and the state water board which the utilities said effectively required CWA discharge permits in California to include so-called "two-concentration toxicity" tests, without the notice and comment required by the Administrative Procedure Act (APA).

The municipalities' claims mirrored arguments made in Iowa League of Cities v. EPA, decided in March 2013 by the U.S. Court of Appeals for the 8th Circuit.

There, the court held that a collection of EPA letters and memos, including correspondence between acting water chief Nancy Stoner and Sen. Charles Grassley (R-IA), amounted to a substantive change in the agency's wastewater policy, undertaken without notice and comment as required by the APA.

In the Iowa League decision, judges said EPA had for all intents and purposes created a new rule by saying it would veto permits that include so-called mixing zones, where higher levels of bacteria are temporarily allowed in waters meant for swimming, or blending, where a portion of peak wet-weather flows is channeled around secondary treatment units, treated using other methods and blended with fully treated wastewater before discharge.

SCAP and its allies sought to extend the standard set by the Iowa League court to the jurisdiction of the 9th Circuit, which includes California. They hoped to win court review of EPA's letters, which came in response to an ATP application seeking federal permission to use a non-standard test method.

In its letters the agency approved the state's use of a test of significant toxicity (TST) using the two-concentration toxicity method, a measure of whole effluent toxicity, both in a pair of then-pending National Pollutant Discharge Elimination System (NPDES) permits and for future permits across the state.

The utilities were seeking to challenge the statement in the letter that "approval is in this case state-wide, that is, it will apply to all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued California permits that include whole effluent toxicity testing provisions."

The plaintiffs said making the approval statewide effectively forced all dischargers in California to use the two-concentration method, which SCAP said is expensive and inefficient, without the APA rulemaking process normally involved in establishing a new mandatory test method.

But EPA withdrew the letters on Feb. 11, and further claimed that the withdrawal mooted the district court suit because California is unlikely to file a similar ATP application in the future -- a claim that England backed in his decision. "[T]he chance of this situation reoccurring is slim. The EPA cannot initiate the ATP process. . . . And there is no indication that the State Water Board will submit another ATP request to the EPA to use the two-concentration TST test method for all of California," England writes.

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